Supreme Court, U. S.
FILED
APR 10 1975
MICHAEL RODAK, JR., CLERK

Number 74-1277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT GRAY

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

April 10, 1975

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Robert Gray, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above-captioned case.

OPINION BELOW

The opinion of the Court of Appeals (App. A., *infra.*) is not yet reported. The trial in the District Court for the Western District of Louisiana was before a jury.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Fifth Circuit was entered on February 7, 1975. A timely petition for rehearing was denied on March 13, 1975 and this petition for certiorari was filed within thirty (30) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. In a criminal income tax case is it a denial of due process for the prosecution, in response to motions for discovery and for a bill of particulars, to furnish defendant a schedule of the specific items of income it intends to prove were understated, then after the defendant voluntarily takes the stand attempt through cross-examination and argument by government counsel to prove willful understatement of items of income not set forth in the government's response to defendant's motions?

2. Is it a denial of due process in a case where, as found by the appellate court, "the result of the trial really turned on criminal intent vel non" for the court to apply an arbitrary and unvarying rule limiting the number of character witnesses to three?

STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America, Amendments V and VI

26 U.S.C. 7201

26 U.S.C. 7206(1)

Rule 7(f) Federal Rules of Criminal Procedure

STATEMENT OF THE CASE

Robert Gray, petitioner herein and the defendant in the proceedings below, was convicted of income tax evasion in violation of 26 U.S.C. 7201 and of filing a false and fraudulent income tax return in violation of 26 U.S.C. 7206(1). Prior to trial, and in response to various discovery motions, the government delivered to the defendant a schedule of adjustments to income purportedly setting forth all items of income which the defendant had allegedly failed to report for the years 1967 and 1968.

The government's case in chief consisted of evidence directly related to the schedule it had given to the defendant prior to the trial. However, once the defendant had voluntarily taken the stand and testified, the government counsel announced:

> "MR. GREER: Your Honor, I intend to introduce evidence and cross examine the defendant on additional items of income which he received and did not report on his tax returns for the years 1967 and 1968. These are both relevant and admissible inasmuch as it is very much a part of this trial. These are similar acts and they are the identical crime for which the defendant is on trial here today." (R. 523)

And the court then said:

> "THE COURT: Mr. Nelson objects, I suppose, because they are not alleged in the indictments. Since they are similar crimes the ruling is they are admissible to show intent." (R. 523)

As anticipated by the court counsel for defendant strenuously objected to the tactics used by the government, which included the following:

1. Prior to trial the government, in response to both a motion for a bill of particulars and motion for discovery, submitted to defendant a schedule of adjustments

to income for 1967 and 1968 setting forth the specific items the government intended to prove were understated by defendant.

2. The government thus led defendant to believe that for 1967 and 1968 he need only be prepared to defend charges relating to items listed on the schedule of adjustments.

3. After defendant voluntarily took the stand to testify concerning the charges against him as detailed in the schedule of adjustments to income, the government then, for the first time, interjected new and unexpected issues into the case by questioning defendant concerning items not shown on the government's schedule of adjustments.

4. The cross-examination of defendant concerned items of alleged income received six or seven years prior to trial, during 1967 and 1968, which items were not set forth in the government's response to defendant's discovery motions.

Concerning this cross-examination of the defendant, the Fifth Circuit acknowledged:

> "Nonetheless, *the ensuing vigorous cross-examination was, in all probability, extremely prejudicial to the defendant Gray*. The result of the trial really turned on criminal intent vel non." (Emphasis supplied)
>
> Fifth Circuit unreported opinion, p. 3325

The defendant's reputation in the community for truthfulness and honesty was thus an important factor. After it had received testimony from only three character witnesses, the trial court announced:

> "THE COURT: It has been the unvarying rule of this Court long before my time and upheld by the Fifth Circuit Court of Appeals that character witnesses are limited to three. We apply that rule here. (R. 403)

Defendant's counsel responded:

> "MR. NELSON: For the record, because the character and reputation is of such importance in the type of crime charged here, we respectfully object to the Court's ruling." (R. 403)

In its opinion below, the Fifth Circuit announced the following rule of law:

> "The number of witnesses allowed to testify should not be arbitrary or unreasonably restrictive, and prejudicial error in those respects will entitle the injured party to relief. A general rule of limitation applicable to all cases without regard to the particular circumstances has been held to exclude discretion and to be, therefore, unreasonable and unlawful."
>
> Fifth Circuit unreported opinion, p. 3327

Notwithstanding the foregoing judicial pronouncement, the Fifth Circuit then concluded that the trial court had exercised its discretion rather than applying an "unvarying rule" as the trial court had stated it was doing.

The Court of Appeals for the Fifth Circuit affirmed defendant's conviction.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal jurisdiction in the trial court was based upon 18 U.S.C. 3231.

REASONS FOR GRANTING THE WRIT

The applicable rule of this Court governing review is:

> "Rule 19.
>
> 1.(b) Where a court of appeals . . . has so far departed from the accepted and usual course of judicial

proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

The indictments charged Robert Gray with failing to report $13,195.70 and $38,363.14 for the years 1967 and 1968 respectively. In asserting his right to know the basis for such charges, defendant filed motions for a bill of particulars and for discovery. Responding thereto the government submitted a detailed schedule of adjustments to income which purportedly "describes the categories of adjustments, the years to which the adjustments apply, and the specific adjustments themselves." (Reproduced Exhibits, Page 8)

Relying upon the government's response setting forth the scope of the charges against him, defendant voluntarily testified. The government then broadened the scope of the charges against defendant by attempting to show other specific adjustments for 1967 and 1968 which had not been set forth in the government's response to defendant's motions.

The Third Circuit in *United States v. Neff*, recognized that "Bills of particulars in criminal cases in Federal Courts are governed by Rule 7(f) of the Federal Rules of Criminal Procedure" and that "a bill of particulars strictly limits the prosecution to proof within the area of the bill." 212 F.2d 297, 309. The Sixth Circuit also observed: "The purpose of a bill of particulars is to enable the accused to avoid surprise, and to enable him to prepare for trial." *Murray v. Williams*, 114 F.2d 285, 288.

As a direct result of the government's failure to limit its prosecution to the schedule of adjustments, defendant, Robert Gray, was unable to avoid surprise and was unprepared to respond to interrogation concerning income received seven years prior to the trial. Illustrative is the following exchange:

"MR. GREER: Some of the $500.00 even checks would be for travel expense?

"MR. GRAY: They very well could be. I don't know."

(Tr. 552)

Similar questions and responses put before the jury considerable data which defendant was unprepared to explain. Without calling any government witness to prove defendant received additional items of unreported income, government counsel was thus able to convince the jury that such had been the case.

The procedure used by the government denied defendant his Sixth Amendment right to confront the witnesses against him. The prosecuting attorney, through innuendo during cross-examination of the defendant and through positive statements during closing argument became the single most important witness against the defendant.

The Sixth Amendment right of confrontation includes the right of cross-examination. *Brookhart v. Janis*, 384 U.S. 1 (1966). Robert Gray had no opportunity to cross-examine witnesses against him concerning the additional items which the government alleged constituted "similar acts" and the "identical crime" for which he was on trial. (R. 523)

Since the suppression by the prosecution of material evidence favorable to an accused violates due process, *Brady v. Maryland*, 373 U.S. 83 (1963), it logically follows that it is a violation of due process to suppress facts which would place the accused on notice of the charges which he must answer during the trial.

A District Court in the Third Circuit has recognized that under Rule 7(f) of the Federal Rules of Criminal Procedure a defendant in a criminal income tax case is entitled to receive from the government a list of the specific items of income that the government intends to prove were understated. *United States v. Goldstein*, 56 F.R.D. 52 (1972). Even if this were not required, once the government chooses to submit a list to the defendant which purportedly sets forth all the items of income which it intends to prove were willfully understated, it is basically unfair to permit the government to surprise the defendant during the trial by questioning him concerning other items.

An additional basis for reviewing the decision of the court below arises from its failure to follow the rule of law announced by the Court concerning arbitrary limitation on the number of character witnesses who may testify in a criminal case. The Court stated "this Court has not upheld any 'unvarying rule' limiting the number of character witnesses and that a general rule of limitation applicable to all cases without regard to particular circumstances would exclude discretion and therefore be unreasonable and unlawful." (Opinion, p. 3327). The trial court, however, stated it was applying an unvarying rule of long standing that character witnesses are limited to three. On this issue no evidence was presented to the trial court and the court below therefore reviewed no evidence on the issue. The rule of law announced by the Fifth Circuit concerning arbitrary limitation of character witnesses required the Court to find the trial court's action to be unlawful. The refusal of the Fifth Circuit to accept the undisputed facts as recited by the trial court and to apply the law to these facts cannot be justified.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

SYDNEY B. NELSON
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Shreveport, Louisiana 71101

Counsel for Petitioner

April 10, 1975

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 1975, three copies of the petition for Writ of Certiorari were mailed, postage prepaid to Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530, counsel for the respondent.

I further certify that all parties required to be served have been served.

SYDNEY B. NELSON
555 Commercial National Bank Building
Shreveport, Louisiana 71101

Counsel for Petitioner

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert GRAY, Defendant-Appellant.

Nos. 74-2282, 74-2283.

United States Court of Appeals,
Fifth Circuit.

Feb. 7, 1975.

Appeals from the United States District Court for the Western District of Louisiana.

Before RIVES, WISDOM and COLEMAN, Circuit Judges.

RIVES, Circuit Judge:

After a six-day trial by jury, Robert Gray was convicted of income tax evasion in violation of 26 U.S.C. § 7201 and of filing a false and fraudulent income tax return in violation of 26 U.S.C. § 7206(1). The calendar years 1967 and 1968 constitute the period covered. Two judgments of conviction were entered with sentences totaling six months' imprisonment to serve, five years on probation, and a requirement that, within twenty-four months, he pay taxes due with penalties and interest.

On appeal, Gray makes no claim of insufficiency of the evidence to support the jury's verdict, but contends that in the course of his trial the district court committed reversible errors. We find no reversible error and hence affirm.

THE FACTS

Gray had some school training as an accountant. He had been employed as bookkeeper for a construction company, then for nine years as comptroller of an independent oil drilling company. In 1966 he had formed a self-owned corporation, Tennky Petroleum Company. He testified that, "I drilled twelve or fifteen wells myself" (App. 427). He also testified to "quite a bit" of activity in the stock market. In 1968 his purchases and sales had amounted to $206,747.72 (App. 485).

For the calendar year 1967 he reported the taxable income of himself and his wife as $9,499.19, a figure less than half of their true taxable income. For 1968 he reported taxable income of $14,125.16, when it was actually nearly four times that amount. The discrepancies were accounted for by items of income not reported and deductions reported to which he was not entitled. He admitted making profits in the stock market which he forgot to report (App. 580, 581). He admitted also that in 1968 he had received from Southwest Production Company a salary totaling $9,750.00 which he forgot to report (App. 507). That $9,750.00 was paid by thirteen checks for $750.00 each. At Gray's request Southwestern made those checks payable to his corporation, Tennky Petroleum Company. Gray testified that he picked up a check twice a month, deposited it to the Tennky account and then wrote a check to himself **"presumably the same day"** and deposited that check to his personal account. He reported as income from Southwest only the amount received on its W-2 tax form (App. 512). Tennky in turn issued no 1099 tax form in the name of Robert Gray (App. 513).

"Q. Nothing at all went to the Government to indicate Robert Gray received $9,750.00, did it?

"A. That is correct." (R. 513.)

Gray testified that he filed an amended return on September 2, 1969, and paid the tax due on the $9,750.00, but he could not recall whether the Examining Agent had discussed that with him prior to his filing the amended return. He testified further on cross-examination:

"Q. You are saying you do not recall today whether Agent Farrar had discussed these omitted checks with you prior to filing that amended return?

"A. No, sir, I don't.

"Q. You said you did hear Agent Caldwell say you admitted that to him?

"A. That is correct. I don't remember admitting it to him. I remember him testifying about it.

"Q. Your interview with him was January 8, 1970, wasn't it?

"A. Somewhere in there." (R. 516.)

It was after the foregoing part of the cross-examination of Gray that counsel for the government received permission to approach the bench.

"(Whereupon there was a discussion at the bench between the Court and counsel of out of the hearing of the jury).

"MR. GREER [Government Counsel]: Your Honor, I intend to introduce evidence and cross examine the defendant on additional items of income which he received and did not report on his tax returns for the years 1967 and 1968. These are both relevant and admissible inasmuch as it is very much a part of this trial. These are similar acts and they are the identical crime for which the defendant is on trial here today.

"THE COURT: Mr. Nelson objects, I suppose, because they are not alleged in the indictments. Since they are similar crimes the ruling is they are admissible to show intent." (R. 523.)

Mr. Nelson, counsel for Gray, did indeed most strenuously object but the court adhered to its ruling with the caveat:

"I will have to charge the jury this is admissible only to show criminal intent. In other words, if they are not to convict him on this as a separate crime mentioned in the indictment, but they are allowed to consider it." (R. 525.)

The court did adequately so instruct the jury. Nonetheless, the ensuing vigorous cross-examination was, in all probability, extremely prejudicial to the defendant Gray. The result of the trial really turned on criminal intent vel non.

Restriction on Number of Character Witnesses

At the beginning of the trial the government submitted to the court a brief containing the following paragraph:

"The Government anticipates that the defendant will offer the testimony of character witnesses in his behalf. Courts in the past have been faced with the problem of where to draw the line on limiting the number of character witnesses. A limitation of character witnesses to three (3) has most frequently been found appropriate and has been approved by the Courts of Appeal. See United States v. Squella-Avendano [478] F.2d [433] (C.A.5th, April 13, 1973); United States v. Jacobs, 451 F.2d 530 (C.A.5th, 1971), certiorari denied, 405 U.S. 955 [92 S.Ct. 1170, 31 L.Ed.2d 231]. The limitation of character witnesses is, of course, in the Court's discretion."

After Gray's third character witness had testified, a colloquy between Gray's counsel and the court occurred.

"MR. NELSON: If it please the Court, we have several other character witnesses—

"THE COURT: It has been the unvarying rule of this Court long before my time and upheld by the Fifth Circuit Court of Appeals that character witnesses are limited to three. We apply that rule here.

"MR. NELSON: For the record, because the character and reputation is of such importance in the type of crime charged here, we respectfully object to the Court's ruling." (R. 403.)

[1] On appeal, Gray insists that the district court applied no discretion but arbitrarily used a fixed and unvarying rule. Since the leading case on "character evidence," Michelson v. United States, 1948, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168, it has been well settled that trial courts are vested "with discretion to limit the number of such witnesses and control cross-examination." 335 U.S. at 480, 69 S.Ct. at 220. See also 6 Wigmore on Evidence, 3d ed. § 1908(2), pp. 580, 581; 2 Wright Federal Practice & Procedure Criminal § 409. However, this Court has not upheld any "unvarying rule" and we agree with the annotation in 17 A.L.R.3d 327, at 335, that,

"The number of witnesses allowed to testify should not be arbitrary or unreasonably restrictive, and prejudicial error in those respects will entitle the injured party to relief. A general rule of limitation applicable to all cases without regard to the particular circumstances has been held to exclude discretion and to be, therefore, unreasonable and unlawful." (Footnotes omitted.)

Professor Wigmore calls attention that the limitation of the number of witnesses applies not only to reputation or character but may be enforced "*upon any point whatever*" (emphasis in text). 6 Wigmore on Evidence, 3d ed. § 1908(3),

p. 581. Especially pertinent to this case are Professor Wigmore's further remarks:

> "It is sometimes required that the trial Court (with or without the parties' motion) *announce before any witnesses on the point are offered*, that a limitation of the witnesses upon the particular fact will be enforced, and a failure to do this is said to prevent the enforcement of any limitation; on the theory that, unless the party is thus advised of the intended limit, he may be obliged to omit his most valuable witnesses through not having known of the necessity of choosing the best of the lot at his disposal. This requirement has a plausible fairness in it, and is usually proper when feasible. But it is not always feasible, because the judge may not know of the party's intention as to number of witnesses; and it is not always proper for the judge to commit himself to such a fixed limit before hearing any of the witnesses. The trial Court's discretion should be left to determine whether such a prior notice was feasible and desirable under the circumstances." (Emphasis in text.) (Footnote omitted.)

At pp. 585, 586. We think it clear that the district judge meant no more than to recognize such a long-standing practice which should "apply here"; that in fact he exercised a sound and reasonable discretion in this particular case.

Permitting a Revenue Agent to Testify as a Summary Witness and Introducing a Summary Chart or Schedule of His Calculations

In his opening statement to the jury, counsel for the government called attention to the necessity of introducing many documents and corporate records, and further said:

> "The law recognizes in this case no juror can be expected to retain all this information and put it in the proper slot. For that reason, the government is entitled to bring in an expert to testify in the case. The law permits the expert to listen to the testimony, examine the documents and testify to his expert opinion as to what these documents mean and what tax, if any, should have been paid by the defendant.
>
> "You, as jurors, are entitled to give that expert's opinion the weight you believe it deserves. What I am saying is for you to bear with us because a tax case is like a jigsaw puzzle and at the end we will put it all together." (R. 7-8.)

In accord with that announced strategy, the government called as its last witness a revenue agent for the purpose of summarizing the evidence and making the resulting tax computations. Similarly, the defendant called as his last witness a certified public accountant who testified at length as to his qualifications and as to a schedule summarizing the evidence.

The propriety of that practice in income tax cases was clearly established by the Supreme Court in United States v. Johnson, 1943, 319 U.S. 503, 519, 63 S.Ct. 1233, 87 L.Ed. 1546. Since *Johnson*, the practice has been accepted and followed in cases too numerous to mention, some of which are listed in the margin.[1] The opinions in many of those cases

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[1] Cave v. United States, 8 Cir. 1947, 159 F.2d 464, 468; United States v. Daisart Sportswear, 2 Cir. 1948, 169 F. 2d 856, 863; Kirsch v. United States, 8 Cir. 1949, 174 F.2d 595, 601; Graves v. United States, 10 Cir. 1951, 191 F.2d 579, 584; Gross v. United States, 9 Cir. 1953, 201 F. 2d 780, 787; Wardlaw v. United States, 5 Cir. 1953, 203 F.2d 884, 885; Banks v. United States, 8 Cir. 1953, 204 F.2d 666, 670; Beaty v. United States, 4 Cir. 1954, 213 F.2d 712, 720; White v. United States, 5 Cir. 1954, 216 F.2d 1, 5; Steele v. United States, 5 Cir. 1955, 222 F.2d 628, 629-630; Smith v. United States, 6 Cir. 1956, 239 F.2d 168; Blackwell v. United States, 8 Cir. 1957, 244 F.2d 423, 431; United States v. Kiamie, 2 Cir. 1958, 258 F.2d 924, 933; Barber v. United States, 6 Cir. 1959, 271 F.2d 265; United States v. Willis, 3 Cir. 1963, 322 F.2d 548, 551; Wirtz v. Turner, 7 Cir. 1964, 330 F.2d 11, 14; Barsky v. United States, 9 Cir. 1964, 339 F.2d 180; United States v. Mackey, 7 Cir. 1965, 345 F.2d 499, 507.

quote from the opinion in *Johnson, supra*, written by Mr. Justice Frankfurter:

> "* * * The worth of our jury system is constantly and properly extolled, but an argument such as that which we are rejecting tacitly assumes that juries are too stupid to see the drift of evidence. The jury in this case could not possibly have been misled into the notion that they must accept the calculations of the government expert any more than they were bound by the calculations made by the defense's expert based on the defendants' assumptions of the case. So long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules."

319 U.S. at 519-520, 63 S.Ct. at 1241.

[2] On the trial, defendant avoided making a frontal attack upon a practice so well settled. Instead, his first insistence was that a summary witness was not needed in a case no more complicated than this, that "there is an extreme in our case," and a "real danger of a person who purports to be an expert invading the province of the jury." (R. 291.) The district court disagreed, recounted the many exhibits and expressed its view that "the jury could not possibly understand or correlate them without the assistance of an expert." (R. 291.) The judge stated further that the evidence would be admitted, "* * * we think in the proper exercise of our discretion and in order to assist the jury, but with a cautionary instruction, conclusions reached by the expert as to whether or not there

was a deliberate, willful understatement of income is the function of the jury rather than the expert." (R. 291.) Defendant's counsel then stated: "[W]e would like to point out the defendant is not by and large disputing the fact that he earned the income asserted by the government. It is a matter of intent and willfulness almost solely. The cases indicate there is a little danger that the jury in hearing an expert testify will conclude by the expert saying there is tax due that there is guilt." (R. 291, 292.)

After further colloquy, the jury was excused from the courtroom pending a voir dire examination of the witness, Malcolm L. Johnson. He had 17½ years' experience as a revenue agent with the Internal Revenue Service, and had testified in two other criminal tax evasion cases. He was not a graduate accountant, had little experience in oil and gas law, and was not familiar with a "carried" working interest in an oil well, nor with three Fifth Circuit cases dealing with the income tax effects of a "carried" interest, *viz.*, C. I. R. v. J. S. Abercrombie Co., 1947, 162 F.2d 338; Prater v. C. I. R., 1959, 273 F.2d 124; United States v. Cocke (en banc), 1968, 399 F.2d 433. The court was recessed overnight to permit Mr. Johnson to read those three opinions and also for the Judge to study and analyze those cases.

The importance of those cases to Gray's defense was claimed because of the terms of his employment by Southwest, Under a letter agreement dated August 15, 1967, Gray was employed by Southwest Production Company. The agreement provides:

> "My beginning salary shall be $1500 per month, payable on the 1st and 15th days of each month. In addition I shall receive 5% of the economic interest retained by Southwest Production Corporation and the related companies in all oil and gas properties acquired after August 15, 1967, plus 5%

of the economic interest retained by those companies in any leases presently owned on which leases wells are drilled in the future. Economic interest is defined to include working interest, overriding royalty, oil payment, production payment, etc.

"After November 15, 1967, either party wishing to terminate this agreement may do so on 90 days written notice."

(Gov't Exh. 22.) In practice, Southwest and Gray were in accord that Gray's "economic interest" was free and clear of any liability for intangible drilling expenses. As to current operating expenses of a producing well, Southwest contended that Gray should pay a proportionate share, while Gray claimed that he did not owe any such costs. No drilling costs or operating costs were actually paid by Gray.

After the overnight recess for consideration of the three cases (*Abercrombie, Prater* and *Cocke*), the district judge stated to counsel his analysis of those cases and his conclusion that they were inapplicable to the case on trial, except for their possible bearing on the question of Gray's good faith in taking deductions for intangible drilling costs and for depreciation upon the equipment necessary for production. We agree.[2]

[3] The district court did not err in overruling the defendant's objection to the competency of Johnson as an expert summary witness. Nor did the court err in allowing Johnson's testimony to be introduced with the court's caveat to the jury: in effect, that Johnson's opinions were not binding upon the jury but were meant to be helpful and were entitled to such weight as the jury might see fit to accord them; that

[2] On appeal, counsel does not seriously argue that Gray was entitled to the deduction of $8,700.00 shown on his 1967 Tax Returns as "intangible drilling and dry hole expenses." Gray's good faith vel non in claiming that deduction was left to the jury.

the jury was bound by the judge's instructions as to the law, while the questions of criminal intent, willfulness, good faith and other questions of fact were left for the jury to determine. We find no reversible error in the district court's rulings on the testimony of the government's expert summary witness.

Cross-examination of Defendant

[4] On trial, as has been stated, Gray's main defense was that he acted in good faith and had no criminal intent. In refuting that defense, the government could properly cross-examine Gray as to similar acts of attempted income tax evasion committed during the calendar years of 1967 and 1968, in addition to the acts charged in the indictments. United States v. Jernigan, 5 Cir. 1969, 411 F.2d 471; United States v. Waller, 5 Cir. 1972, 468 F.2d 327; accord Ahrens v. United States, 5 Cir. 1959, 265 F.2d 514; Wright Federal Practice & Procedure, Criminal § 410.

We find no reversible error committed in the cross-examination of the defendant. His cross-examination was thorough and vigorous but nonetheless fair.

The Court's Instructions to the Jury

[5] The court properly refused defendant's requested jury instruction No. 10, which concluded:

"Under court decisions by the United States Court of Appeals for the Fifth Circuit, which includes Louisiana, a carried party could, between the years 1947 and 1968, deduct his proportionate share of the cost of development and operation of the well even though he did not spend any of his own funds to pay for these costs. Commissioner of Internal Revenue v. [J. S.] Abercrombie Co., 162 F.2d 338 (5th Cir., 1947); Prater v. Commissioner of Internal Revenue, 273 F.2d 124 (5th Cir., 1959); United States v. Cocke, 399 F.2d 433 (5th Cir., 1968)."

As has been developed, the cited cases had no relevance to Gray's tax liability. They might possibly bear upon the question of whether he acted in good faith and without criminal intent.

The court refused also defendant's requested jury instruction No. 7 concerning willfulness and particularly charging:

> "There must be specific wrongful intent to conceal an obligation known to exist as compared to a genuine misunderstanding of what the law required."

[6] The court's general charge included an instruction to the same effect (R. 740). The court fully and properly instructed the jury that Gray could not be convicted because of mistake, inadvertence or other innocent reason, but that willfulness and specific criminal intent must be proved.

Finding no reversible error, the judgment is

Affirmed.

APPENDIX B

CONSTITUTION OF UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Council for his defence.

26 U.S.C. 7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5

years, or both, together with the costs of prosecution. (68A Stat. 851.)

26 U.S.C. 7206

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. (68A Stat. 852.)

RULE 7. FEDERAL RULES OF CRIMINAL PROCEDURE

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

No. 74-1277

In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted of two counts of willfully attempting to evade a large part of his income tax for the years 1967 and 1968, in violation of 26 U.S.C. 7201, and two counts of filing false and fraudulent returns for those years, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to five years in prison, all but six months of which were suspended, placed on probation for five years, and ordered to pay the taxes due, with penalties and interest, within 24 months. The court of appeals affirmed (Pet. App. A 11-22).

Petitioner contends that the trial court erred in permitting the government to introduce proof of items of unreported income not included in the bill of particulars, and in limiting petitioner to three character witnesses.

The items of unreported income introduced at trial but not mentioned in the bill of particulars were brought out during the cross-examination of petitioner (Tr. 525-538, 551-559).[1] The trial court made it clear, however, that this evidence was admitted only with respect to the element of willfulness. This ruling was correct and consistent with the well-settled line of decisions holding that a court may permit introduction of similar acts of misconduct where intent is an element of the offense, and where those acts may cast light on that element. *United States* v. *Waller*, 468 F.2d 327, 329 (C.A. 5); *United States* v. *Mancuso*, 444 F.2d 691 (C.A. 5); *Oden* v. *United States*, 410 F.2d 103, 105 (C.A. 5); *United States* v. *Jernigan*, 411 F.2d 471 (C.A. 5).

Here, the evidence in question showed acts similar in nature and in point of time to those charged in the indictments and the bill of particulars, and thereby served a legitimate function in proving petitioner's willfulness. The proof consisted of petitioner's records, which he himself had prepared (Govt. Exs. 70-77). Moreover, petitioner was given every opportunity to make any explanations he wished as to those transactions (Tr. 525-560), and there was a recess over a weekend in which he had ample opportunity to refresh his memory with respect to these facts (Tr. 569). However, on redirect examination, at the beginning of the following week, defense counsel chose not to offer any further explanation on these points (Tr. 601-606).

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[1] "Tr." refers to the trial transcript.

Petitioner further argues (Pet. 8) that the trial court erred in limiting to three the number of character witnesses whom petitioner might call. However, trial courts have broad discretion in setting the number of character witnesses a defendant may call, and appellate courts will not disturb their rulings unless there is a clear abuse of discretion. *Michelson* v. *United States*, 335 U.S. 469, 480. Here, the defense was advised of the ruling before it called any such witnesses, and was able to put on the three witnesses whom it thought would provide the most favorable testimony. Additional character witnesses would not have added anything to what had already been said.

Contrary to petitioner's argument (Pet. 8), the trial court's adherence in this case to a custom of limiting character witnesses to three was not unlawful for failure to exercise discretion. The mere fact that the court referred to a general custom of limiting such witnesses to three and decided to so rule in this case does not mean that the trial court did not exercise its discretion. Rather, it simply found this case an appropriate one for application of the customary rule. As the court of appeals observed (Pet. App. A 16), "[w]e think it clear that the district judge meant no more than to recognize such a long-standing practice which should 'apply here'; that in fact he exercised a sound and reasonable discretion in this particular case."

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.